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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT DAVIS,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 32A05-0609-CR-531

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Jeffrey V. Boles, Judge
Cause No. 32C01-0606-FC-22

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Robert Davis appeals the trial court's order following our remand to correct his sentence. The trial court determined Davis was indigent and ordered him to reimburse the Public Defender's Fund \$16,350.00, *if* he had money at some future time. We held that provision of his sentence was erroneous on its face because it included an order for prospective reimbursement.

In February of 1997, some eight months before Davis was sentenced, \$19,000.00 apparently was seized from Davis' house pursuant to a search warrant and forfeited to the State in a separate proceeding in Clay County. *See infra* n.4 and n.6. Unknown to us at the time of Davis' prior appeal, the same day the trial court sentenced Davis, it separately ordered the Clay County Sheriff's Office to give the Public Defender's Fund \$16,350.00 from that seized and forfeited money.

On remand, Davis asserted our opinion required the State to refund his money. The trial court declined to order the State to give Davis \$16,350.00, and Davis appeals again. We affirm.

FACTS AND PROCEDURAL HISTORY

Davis' sentencing order provided:

The court inquired of Mr. Akers [defense counsel] the amount of funds used from the Clay County Public Defender fund for trial purposes. Mr. Akers reported to the court that the amount of \$11,350.00 was expended for Mr. Davis' trial. Mr. Akers further agreed to perfect an appeal in this case for the amount of \$5,000.00. The court therefore orders that if at a subsequent time it should be determined that Mr. Davis has funds with which to reimburse the Clay County Public Defender fund that he should do so in the amount of \$16,350.00 which represents reimbursement for attorney fees expended by Clay County Public Defender fund for Robert Davis' defense for trial and appeal.

(App. at 171.)

On May 25, 2005, Davis, acting *pro se*, filed a Motion to Correct Erroneous Sentence in which he challenged the order that he reimburse the Public Defender \$16,350.00. He asserted he was entitled to relief because the sentencing order was erroneous on its face. The trial court denied his motion, and Davis appealed.

On appeal, the State “concede[d] ‘the Court’s order of reimbursement was likely an abuse of discretion,’ (Br. of Appellee at 7).” *Davis v. State*, 843 N.E.2d 65, 68 (Ind. Ct. App. 2006). We held:

Three statutes address when a defendant must reimburse the county for counsel provided at public expense. One provides in relevant part:

If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following:

(1) For a felony action, a fee of one hundred dollars (\$100).

Ind. Code § 35-33-7-6(c). This statute contemplates that trial courts will order the defendant to pay the \$100 fee at the initial hearing, *see* Ind. Code § 35-33-7-6(a), but it does not prohibit trial courts from imposing the fee at other stages of the proceedings.

When Davis was sentenced, two statutes allowed trial courts to impose representation costs in excess of \$100 against a defendant. Ind. Code § 33-9-11.5-6(a) (now Ind. Code § 33-40-3-6) provided that if “the court makes a finding of ability to pay the costs of representation,” the defendant shall pay “[r]easonable attorney’s fees if an attorney has been appointed for the person by the court.” These fees, which may not exceed the cost of defense services rendered to the person, can be imposed “at any stage of a prosecution.” Ind. Code § 33-9-11.5-6(a), (d).

Ind. Code § 33-19-2-3(a) (now Ind. Code § 33-37-2-3) provided “[w]hen the court imposes costs, it shall conduct a hearing to determine whether the convicted person is indigent.” If, after such a hearing, “the court determines that a convicted person is able to pay part of the costs of representation, the court shall order the person to pay an amount of not more than the cost of the defense services rendered on behalf of the person.” Ind. Code § 33-19-2-3(c). This amount must be assessed when the court imposes costs. Ind. Code § 33-19-2-3(a).

In *May v. State*, 810 N.E.2d 741, 745-46 (Ind. Ct. App. 2004), the trial court ordered May to reimburse the public defender fund in the amount of \$750.00, but did not specify which statute permitted that reimbursement order. Nor did the trial court make a finding or conduct a hearing regarding May's ability to pay the costs of representation. We remanded with instructions to reverse the assessment of the public defender fee, and instructed the trial court that if it wished to impose such a fee, it must follow the statutory requirements. *Id.* at 746.

In light of the statutory language and our holding in *May*, we decline to hold a trial court has the authority to order a presently indigent defendant to pay restitution based on possible future earnings or other speculative prospective wealth. As a result, the trial court erred in prospectively ordering Davis to reimburse the public defender's fund \$16,350.00.

Id. at 68-69.

On remand, the trial court received argument and documents demonstrating the \$16,350.00 public defender fee had been paid out of money seized from Davis eight months earlier.¹ Davis argued our appellate opinion required the State to reimburse the

¹ On the same day Davis was originally sentenced, October 14, 1997, G. Steven Bell, Chief Probation Officer of Clay County, stated under oath:

1. On October 14, 1997, during the sentencing of Robert Davis in this cause, the Court entered judgment against the Defendant in the amount of \$16,350.00 for the Clay County Public Defender's Fund.
2. Further in that order, I was ordered to execute that judgment on any of the Defendant's property located in Clay County.
3. When the defendant was arrested on February 14, 1997, the Clay County Sheriff's Department seized over \$19,000 cash in the possession of the Defendant.
4. The Defendant's money is subject to execution.
5. The Clay County Sheriff's Department still possesses that money.

Wherefore, this Court is requested to issue an order directing the Clay County Sheriff's Department to deliver to the Clay County Probation Officer the amount of \$16,350.00 of the Defendant's monies held by it to be directly deposited with the Clerk of Clay Circuit Court in the Clay County Public Defender's Fund in satisfaction of the judgment so entered.

(App. at 46.) The court granted Bell's request:

The Clay County Sheriff's Department is ordered to deliver to G. Steven Bell, Clay County Probation Department the sum of \$16,350.00 cash seized from the Defendant Robert Davis at the time of his arrest to be directly deposited with the Clerk of the Clay Circuit in the Clay County Public Defender Fund.

\$16,350.00 to him. The trial court refused to order the Public Defender's Fund to reimburse Davis.

DISCUSSION AND DECISION

The trial court properly denied Davis' request for reimbursement. Our prior opinion dealt only with the prospective nature of the court's original sentencing order.² The essence of our holding was that, because Davis was apparently indigent and headed to prison, the court should not have ordered Davis to pay the money. Rather, a hearing should have been held at some future date, presumably when Davis was released from prison and earning money, to determine whether Davis was still indigent or could be ordered to reimburse the Public Defender's Fund. Nevertheless, the trial court could have entered a finding in Davis' sentencing order regarding the amount of public funds expended to defend him.

Be that as it may, Davis' sentencing order is not the reason the State is in possession of his \$16,350.00. The sentencing order did not effectuate a transfer of money from Davis, or anyone else, to the Public Defender's Fund. Rather, the record before us suggests the money Davis seeks was transferred to the Public Defender's Fund from the Clay County Sheriff's Department by an order of the Hendricks County Court

(*Id.* at 172.)

² The prior appeal arose from Davis' motion to correct erroneous sentence, *see* Ind. Code § 35-38-1-15, which provides "prompt direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence." *Robinson v. State*, 805 N.E.2d 783, 785 (Ind. 2004) (quoting *Gaddie v. State*, 566 N.E.2d 535, 537 (Ind. 1991)). Such motions are appropriate only when a sentence is erroneous on its face. *Id.* When claims of sentencing errors require consideration of matters outside the face of the sentencing judgment, they are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence. *Id.* at 787.

that sentenced him. *See supra* n.4. The validity of that order is not before us today, and we decline to review it.³

Because our prior opinion did not require the court to reimburse any money to Davis, we affirm the trial court's denial of that request.

Affirmed.

SHARPNACK, J., and BAILEY, J., concur.

³ Davis filed a Trial Rule 53 Motion because he believed Hendricks County court had failed to rule on his Motion for Seized property. The court explained:

This Court held a hearing on that motion on August 18, 2000, which is documented by a CCS entry on that date. At that hearing, the Court informed the defendant that his recourse regarding the return of seized property was in the civil RICO action filed in Clay County. According to David Thomas, Clay County Prosecutor, Mr. Davis was served notice of that civil action by publication, and he was defaulted. *All of this transpired before the criminal action was transferred to Hendricks County. The Court advised Mr. Davis at the hearing on 8-18-00 that it did not have jurisdiction over the seized property and that any such motion for return of seized property must be filed in the civil RICO action.*

This Court did order that \$17,000.00 of Mr. Davis's assets be used to re-pay Clay County for public defender fees expended on behalf of Mr. Davis. Mr. Davis was told that the Court would inquire of appellate counsel, Blaine Akers, whether or not an itemized statement of public defender fees was available. The Court did inquire of Mr. Akers and informed Mr. Davis by a letter dated August 24, 2000 that Mr. Akers did not have any itemization of public defender fees.

Therefore, the Court takes exception to the Praecipe for Withdrawal of Submission pursuant to Indiana Trial Rule 53.1(E)(1) for the reason that it held a hearing on August 18, 2000 and informed Mr. Davis of its lack of jurisdiction on the issue of return of seized property.

(App. at 85) (emphasis added).